

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JEHAN ZEB MIR,

Plaintiff,

v.

KIMBERLY KIRCHMEYER et al.,

Defendants.

Case No.: 3:12-cv-02340-GPC-DHB

**ORDER AFFIRMING
MAGISTRATE JUDGE PORTER'S
ORDER DENYING MOTION TO
COMPEL FURTHER DEPOSITION
OF LINDA WHITNEY
[ECF Nos. 200, 205.]**

Before the Court are Plaintiff Jehan Zeb Mir's ("Plaintiff's") Objections (Dkt. No. 205) to Magistrate Judge Louisa S. Porter's October 19, 2016 order denying Plaintiff's motion to compel a further deposition of Linda Whitney (Dkt. No. 200). Defendants Kimberly Kirchmeyer and Sharon Levine, M.D. (collectively, "Defendants"), filed a response to Plaintiff's Objections. (Dkt. No. 213.) Plaintiff filed a reply. (Dkt. No. 226.) The Court deems Plaintiff's Objections suitable for disposition without oral argument pursuant to Civil Local Rule 7.1(d)(1). Having reviewed Plaintiff's Objections and the applicable law, and for the reasons set forth below, the Court **OVERRULES** Plaintiff's Objections and **AFFIRMS** Magistrate Judge Porter's order denying Plaintiff's motion to

1 compel a further deposition of Linda Whitney.

2 **BACKGROUND**

3 Because the Court has previously recited the facts of this case at length, (*see* Dkt.
4 No. 159), a brief review of relevant procedural background suffices for purposes of this
5 Order.

6 Plaintiff initiated this action on September 25, 2012, alleging that Defendants
7 wrongfully took disciplinary action against his physician's and surgeon's certificate.
8 (Dkt. No. 1.) Plaintiff seeks prospective injunctive relief under 42 U.S.C. § 1983 against
9 Defendants in their official capacities, challenging the underlying California Medical
10 Board's decision to revoke his license. (Dkt. No. 159 at 39.¹)

11 On July 18, 2016, Plaintiff deposed Linda Whitney, who served as the Executive
12 Director for the California Medical Board from 2010 until her retirement in 2013. (Dkt.
13 No. 197-3 at 4–6.) Ms. Whitney is not a party to this litigation. Near the end of the
14 deposition, Plaintiff asked Ms. Whitney to review over 700 pages of hearing transcripts
15 from the underlying state administrative disciplinary action that occurred between
16 October 2004 and May 2005. (*Id.* at 13–18.) Specifically, Plaintiff asked Ms. Whitney
17 to search through the transcripts and identify where in the transcripts Plaintiff made the
18 statement “the proctor would not allow him to do a femoral popliteal bypass procedure on
19 June 10, 2000.” (*Id.* at 14.) Plaintiff informed Ms. Whitney that she did not “have to do
20 it today,” but that she could “take these transcripts with [her], and go through them with
21 tooth and nail” after the deposition. (*Id.* at 16.) Notably, Plaintiff conceded on the record
22 that the statement does not appear anywhere in the transcripts. (*Id.* (“I can tell you it’s
23 not there, there is nowhere you can find it.”).) Ms. Whitney’s counsel objected to the
24 question and instructed her not to respond. (*Id.* at 16–17.)

25
26 ¹ All citations to the record refer to pagination generated by the CM/ECF system.
27
28

1 Plaintiff sought to compel Ms. Whitney to attend a further deposition to answer his
 2 question. (Dkt. No. 197-2 at 8.) In response, Defendants argued that it would be unduly
 3 burdensome, annoying, and harassing to require Ms. Whitney to search for a certain
 4 statement in the transcripts that does not exist, for the sole purpose of confirming the
 5 statement's absence from the transcripts. (Dkt. No. 197 at 4–9.) On October 19, 2016,
 6 Magistrate Judge Porter denied Plaintiff's motion to compel. (Dkt. No. 200.) Plaintiff
 7 filed the instant Objections *nunc pro tunc* to November 7, 2016. (Dkt. No. 205.)

8 **LEGAL STANDARD**

9 Under Federal Rule of Civil Procedure 72(a), aggrieved parties may file objections
 10 to the rulings of a magistrate judge in non-dispositive matters within fourteen days.
 11 Fed. R. Civ. P. 72(a). In reviewing a magistrate judge's order, the district judge "must
 12 consider timely objections and modify or set aside any part of the order that is clearly
 13 erroneous or is contrary to law." Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A); *see*
 14 also *United States v. Raddatz*, 447 U.S. 667, 673 (1980); *Osband v. Woodford*, 290 F.3d
 15 1036, 1041 (9th Cir. 2002). Under the "clearly erroneous standard," a court should
 16 overturn a magistrate judge's ruling when it is "left with the definite and firm conviction
 17 that a mistake has been committed." *See Concrete Pipe & Prods. of Cal., Inc. v. Constrs.*
 18 *Laborers Pension Trust*, 508 U.S. 602, 622 (1993). A magistrate judge's legal
 19 conclusions as to non-dispositive matters are reviewable for clear error. *Grimes v. City &*
 20 *Cnty. of San Francisco*, 951 F.2d 236, 240–41 (9th Cir. 1991) (citing *Maisonville v. F2*
 21 *America, Inc.*, 902 F.2d 746, 747–48 (9th Cir. 1990)).

22 **DISCUSSION**

23 Plaintiff objects to Magistrate Judge Porter's order. (Dkt. No. 205.) Plaintiff
 24 argues that Ms. Whitney declined to answer his question "even though two hours of
 25 deposition time was [sic] still left and it would not have taken more than 30 minutes of
 26 her time to flip through the pages of the transcripts to find the answer to the question."

1 (*Id.* at 4.) Plaintiff argues that he gave Ms. Whitney “the option to take the transcripts
2 home” and review them “at her leisure in the following month.” (*Id.*) Plaintiff asserts
3 that there was “nothing burdensome” about his request, because Ms. Whitney was a
4 retiree at the time of her deposition. (*Id.* at 6.) Plaintiff asserts his belief that Ms.
5 Whitney “must know when and where the false statement was made” and should have
6 had a “ready answer” to his question. (*Id.* at 5.)

7 Defendants respond that the Court properly denied a further deposition of Ms.
8 Whitney, because Plaintiff failed to establish that Ms. Whitney had personal knowledge
9 of the transcripts to provide testimony relating to matters therein. (Dkt. No. 213 at 3.)
10 Defendants contend that Plaintiff did not seek to refresh Ms. Whitney’s recollection, but
11 rather wanted her to examine “an incomplete set of voluminous transcript pages” from a
12 state administrative hearing that Ms. Whitney “did not participate in nor . . . was required
13 to review as the Executive Director.” (*Id.* at 4.) Moreover, Plaintiff himself admitted
14 that the information he sought does not exist in the transcripts. (*Id.* at 5.) Plaintiff
15 already has access to the discovery that he seeks. (*Id.*)

16 Federal Rule of Civil Procedure 30(d)(3) permits a deponent or party to move to
17 terminate or limit a deposition at any time during a deposition on the ground that it is
18 being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or
19 oppresses the deponent or party. Fed. R. Civ. P. 30(d)(3)(A). The Court may order the
20 deposition be terminated or limited in scope and manner as provided in Rule 26(c). Fed.
21 R. Civ. P. 30(d)(3)(B). Rule 26(c) provides that the Court may limit discovery to protect
22 a party or person from annoyance, embarrassment, oppression, or undue burden or
23 expense. Fed. R. Civ. P. 26(c)(1).

24 As a starting point, Plaintiff’s attempt to compel Ms. Whitney to answer his
25 deposition question is incredible in light of his own admission that the statement he asked
26 her to identify does not appear even once within approximately 700 pages of transcripts.
27
28

1 Furthermore, Magistrate Judge Porter properly relied on *Deep South Oil Co. of*
 2 *Texas v. Metropolitan Life Ins. Co.*, 25 F.R.D. 81 (S.D.N.Y. 1959) to conclude that “it is
 3 improper to require a witness to examine records he is not familiar with in order to obtain
 4 information upon which he could then answer.” (Dkt. No. 200 at 2–3.) In *Deep South*
 5 *Oil Co. of Texas*, the court stated:

6 As a general rule, the taking of an oral deposition pursuant to F.R.C.P. rule 26,
 7 should not be converted in effect into an interrogatory procedure (Rule 33) or an
 8 inspection procedure (Rule 34) by the device of asking a witness a series of
 9 questions the answers to which he does not know and then directing him to prepare
 10 or formulate answers by examining books or records, which answers would then
 11 simply amount to a verbalization of what the witness found in the examined books
 12 or records. In the usual case, to sanction such a device would circumvent the
 13 particular procedures and objectives of Rules 33 and 34 and would disregard the
 14 functional differences between Rule 26 and Rules 33 and 34.

15 25 F.R.D. at 82; *see also In re Folding Carton Antitrust Litigation*, 83 F.R.D. 132 (N.D.
 16 Ill. 1979) (holding deponents were not competent to testify about documents they had
 17 never seen before, and questions requiring the deponents to study the unfamiliar
 18 documents were improper). Plaintiff’s question to Ms. Whitney was similarly improper,
 19 and its impropriety is amplified in light of his concession that he already knew the answer
 20 to the question he posed.

21 Plaintiff’s citations are inapposite. *See Ethicon Endo-Surgery v. U.S. Surgical*
 22 *Corp.*, 160 F.R.D. 98, 99 (S.D. Ohio 1995) (concluding that “[t]he record reflects
 23 numerous instances of improper instructions to witnesses not to answer questions by
 24 attorneys”); *Calderon v. Experian Info. Sols., Inc.*, 287 F.R.D. 629, 632–33 (D. Idaho
 25 2012), *aff’d*, 290 F.R.D. 508 (D. Idaho 2013) (stating that the weight of the burden “on
 26 the party seeking the discovery to prove that the potential witness is a managing agent of
 27 the corporation” is “modest” and that where there is a “close question” on this issue,
 28 “doubts should be resolved in favor of allowing the deposition”); *Quantachrome Corp. v.*

1 *Micromeritics Instrument Corp.*, 189 F.R.D. 697, 699 (S.D. Fla. 1999) (finding that
2 counsel “improperly and repeatedly instructed deponents not to answer questions based
3 on relevancy or form objections”); *Pilates, Inc. v. Georgetown Bodyworks Deep Muscle*
4 *Massage Centers, Inc.*, 201 F.R.D. 261, 262 (D.D.C. 2000) (concluding that counsel
5 improperly instructed witnesses not to answer questions multiple times during the
6 deposition). Here, as Plaintiff conceded on the record, Plaintiff knows the answer to his
7 own question. No doubt exists as to whether the statement Plaintiff demanded Ms.
8 Whitney to locate appears even once in the voluminous set of transcripts. Defense
9 counsel’s one and only instruction to Ms. Whitney not to answer Plaintiff’s question was
10 not improper.

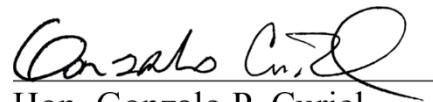
11 The Court concludes that Magistrate Judge Porter properly concluded that it would
12 be unduly burdensome, annoying, and harassing to require Ms. Whitney to respond to the
13 question.

14 **CONCLUSION**

15 For the foregoing reasons, the Court **OVERRULES** Plaintiff’s Objections and
16 **AFFIRMS** Magistrate Judge Porter’s order denying Plaintiff’s motion to compel a
17 further deposition of Ms. Whitney. (Dkt. Nos. 200, 205.)

18 **IT IS SO ORDERED.**

19 Dated: December 19, 2016


20 Hon. Gonzalo P. Curiel
21 United States District Judge

22
23
24
25
26
27
28